NO. 55430-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BOBBI JO TWETEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge Pro Tem

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it determined it had "no choice" but to impose high-end standard range sentences.

2. The trial court erred in imposing sentences totaling 84 months in prison. 1CP[1] 31; 2CP 159.

Issue Pertaining to Assignments of Error

At sentencing, following a failed attempt at drug court, the sentencing judge stated that he had "no choice" but to sentence appellant to high-end standard range sentences because a different judge in an earlier proceeding had promised to impose high end standard range sentences if appellant failed drug court. Did the sentencing judge abuse his discretion by failing to exercise his independent discretion at sentencing?

B. STATEMENT OF THE CASE

On January 8, 2003, the Skagit County Prosecutor charged appellant Bobbi Jo Tweten with two counts of first degree escape. 1CP 1-

[1] On January 25, 2005, this Court consolidated appellant Bobbi Jo Tweten's separate appeals brought in Skagit County Cause Nos. 03-1-00018-2 ("018") & 04-1-00703-7 ("703"), under COA No. 55430-1-I. There are, however, separate indexes to the Clerk's papers for each Skagit County Cause Number. Therefore, Clerk's Papers from 018 will be referenced as "1CP" and Clerk's papers from 703 will be referenced as "2CP."

2; RCW 9A.76.010. The State alleged that Tweten, having previously been convicted of a Class B felony, escaped from custody on August 27, 2002 and again on January 4, 2003. 1CP 1-2.

At Tweten's arraignment on March 13, 2003, the court agreed to consider having Tweten participate in drug court. 1RP 3.[2] On July 30, 2003, Tweten entered into a "Drug Court Waiver and Agreement" and an accompanying "Statement of Defendant on Submittal or Stipulation to Facts" and was accepted into drug court. 1CP 4-13; 2RP 3-4. On August 11, 2004, the State notified Tweten and the court of its intent to seek termination of Tweten's participation in drug court "due to nonamenability." 3RP 2.

On September 16, 2004, the Skagit County Prosecutor charged Tweten with five counts of forgery. 2CP 1-2; RCW 9A.60.020. The State alleged that between February 3rd & 6th, 2002, Tweten forged five separate checks. 2CP 1-2.

On September 22, 2004, Tweten entered into a "Drug Court Waiver and Agreement," a "Statement of Defendant on Submittal or Stipulation to Facts," an "Agreed Order of Restitution," and a "Waiver of

[2] There are five volumes of verbatim report of proceedings referenced as follows: 1RP - March 13, 2003; 2RP - July 30, 2003; 3RP - August 11, 2004; 4RP - September 22, 2004; 5RP - November 17, 2004.

Right to Contest Termination of Drug Court" on the forgery charges and was accepted into drug court. 2CP 9-148; 4RP 2-3. Tweten and the State also amended the drug court agreement regarding the escape charges by filing an "Amended Drug court Waiver," Amended Statement of Defendant on Submittal or Stipulation to Facts," and a "Waiver of Right to Contest Termination of Drug Court." 1CP 14-20; 4RP 3.

On November 17, 2004, the court granted the State's request to terminate Tweten's participation in drug court on both the forgery and escape charges. 5RP 2-3. The court then entered findings of fact and conclusions of law finding Tweten guilty of all charges. 1CP 21-26; 2CP 149-54; 5RP 5. Sentencing immediately followed before the Honorable David R. Needy.[3] 5RP 5-10.

The State requested the court impose concurrent mid-standard range sentences of 73.5 months for each escape and high-end standard range sentences of 29 months for each forgery. 5RP 5-6. Defense counsel requested the court impose concurrent low-end standard range sentences. 5RP 6-7.

Following Tweten's opportunity for allocution, 5RP 8, Judge Needy made the following remarks:

---

[3] By Tweten's agreement, Commissioner Needy heard the matter as a pro tem judge. 1CP 16; 2CP 14.

> On September 8th of this year, I believe Judge [John M.] Meyer gave you one more last, last, last chance to participate in drug court, and you and he made a deal at that time that you were given that extra chance to prove yourself and failed, that he promised you you would get the high end of standard range.[4] You accepted that deal, as I certainly expect anyone would in your situation, because you knew it was your last, last chance. You were going to prove you could handle the situation and be successful.
>
> Two months later we find ourselves in court with once again emotions and tears and promises, but failure on your part. It is a failure that everyone here in drug court shares. It is not you alone and it is not your responsibility completely alone. You are the one today who will be paying the consequences. As I have already said, it is not a happy day for any any of us. Under the circumstances the court finds it has no choice but to sentence you to the top of the standard range, 84 months on the escape charges, 29 months on the forgery cases.

5RP 9-10 (emphasis added). Judgments and sentences reflecting Judge Needy's oral ruling were entered. 1CP 27-36; 2CP 155-66. This appeal timely follows. 1CP 37-47; 2CP 170-82.

---

[4] Notably, there are no minute entries for a September 8, 2004 hearing before the Honorable John M. Meyer. According to the Skagit County Clerk, minutes are not prepared and the proceedings are not recorded in drug court unless a person his being granted participation in drug court or terminated from drug court. There is, however, an order filed on August 25, 2004, providing that a drug court termination hearing for Tweten was continued until September 8, 2004. Supp CP __ (sub no. 35, Order re: Continuance, 8/25/04). There is also an order filed on September 8, 2004, providing that the "matter is continued to 9/22/04 for Drug Court." Supp CP __ (sub no. 36, Order re: Continuance, 9/8/04). That order also provides "Δ to prepare Δ's waiver of right to termination hearing. If court

C. ARGUMENT

THE SENTENCING COURT'S FAILURE TO EXERCISE ITS INDEPENDENT DISCRETION AT SENTENCING REQUIRES RESENTENCING.

As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the correct standard sentencing range established by the Sentencing Reform Act. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); see e.g., RAP 2.2(b)(6) (providing that the State or a local government may only appeal "[a] sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range"); RCW 9.94A.585(1) ("A sentence within the standard sentence range . . . for the offense shall not be appealed."). This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length. Williams, 149 Wn.2d at 146-47; see State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986).

---

allows Δ to remain in Drug Court, Δ will waive her right to formal termination hearing and waive her right to contest termination." Id.

This prohibition, however, does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (permitting appellate review of a criminal sentence where a defendant can demonstrate that the "sentencing court had a duty to follow some specific procedure required by the [Sentencing Reform Act], and that the court failed to do so"). It is well established that appellate review is still available for the correction of legal errors or abuses of discretion[5] in the determination of what sentence applies. Williams, 149 Wn.2d at 147; see e.g., State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (misclassification of out-of-state convictions for purposes of calculating offender score); State v. Channon,

[5] It is an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), quoting, State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). It is also an abuse of discretion when the court categorically fails to exercise its discretion. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998); see State v. Barnes, 58 Wn. App. 465, 477, 794 P.2d 52 (1990) (an abuse of discretion can result from the failure to exercise discretion), affirmed, 117 Wn.2d 701, 818 P.2d 1088 (1991).

105 Wn. App. 869, 876, 20 P.3d 476 (2001) (determination of whether two or more crimes should be considered the "same criminal conduct" for purposes of sentencing); see also State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (noting that an absolute prohibition on the right to appeal would violate Wash. Const. Art I, § 22).

This Court's decision in State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002) is instructive. In McGill, the defendant was convicted of three counts of delivery of cocaine and one count of possession of cocaine with the intent to deliver based on three controlled buys involving a police officer and a confidential informant, each occurring within the same week. McGill, 112 Wn. App. at 97-98. Although defense counsel did not ask for an exceptional sentence below the standard range at the sentencing hearing, the court's comments indicated it would have considered an exceptional sentence had it known it had authority to do so.

> *I'm sure you are aware that the legislature has decided that judges should not have discretion beyond a certain sentencing range on these matters*. And sometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn't seem to be justified. But it's not my call to determine the standard range. The legislature has done that for me.
>
> *So I have no option but to sentence you within the range on these of 87 months to 116 months. But I do get to decide where in that range the sentence is appropriate*.

McGill, 112 Wn. App. at 98-99 (emphasis in original).

On appeal, McGill argued the sentencing court erred in failing to recognize that it had authority to impose an exceptional sentence. McGill, 112 Wn. App. at 97. This Court agreed, noting that "[u]nder RCW 9. 94A.535(1)(g),[6] it is within the discretion of a sentencing court to consider and impose an exceptional sentence downward under the multiple offense policy of the SRA." McGill, 112 Wn. App. at 99.

Although the State argued McGill was precluded from appealing his standard range sentence, this Court disagreed:

> The State argues that, under former RCW 9.94A.210(1), a defendant may not appeal a standard range sentence. That standard, however, is not an absolute prohibition on the right of appeal. "Rather, it precludes only appellate review of 'challenges to the amount of time imposed when the time is within the standard range.'" We can therefore review a court's decision to impose a standard range sentence in "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling. Here, the trial court refused to exercise its discretion to consider an exceptional sentence because it erroneously believed it lacked the authority to do so.

---

[6] RCW 9.94A.535(1)(g) provides:

> The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

McGill, 112 Wn. App. at 99-100 (footnotes and citations omitted, emphasis added); see also, State v. Grayson, __ Wn.2d __, 111 P.3d 1183 (2005) (categorical refusal of sentencing court to consider DOSA constitutes an abuse of discretion).

A similar situation exists here -- the sentencing court erroneously believed it lacked authority to impose anything except high-end standard range sentences because of undocumented and unsubstantiated comments by Judge Meyer at an earlier hearing. See Supp CP __ (sub no. 35, supra) (Order from September 8, 2004 hearing does not indicate Judge Meyer said he would impose a high-end standard range sentence if Tweten failed drug court). But what Judge Meyer would have done is irrelevant because he was not the sentencing judge and had no authority to eliminate the sentencing court's discretion at sentencing. Because it is unclear whether the sentencing court would have imposed the same sentence had it known it had discretion under the SRA to impose something less than high-end standard range sentences, this Court should remand to allow the court "to exercise its principled discretion." McGill, 112 Wn. App. at 101.

D. CONCLUSION

For the reasons stated herein, this Court should reverse Tweten's sentence and remand for resentencing.

DATED this ____ day of June, 2005

Respectfully submitted,

NIELSEN, BROMAN & ASSOCIATES

_____
CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant